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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JERROD ROSS McBRIDE, Petitioner.	2 CA-CR 2009-0295-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074675

Honorable Gus Aragon, Judge

REVIEW GRANTED; RELIEF GRANTED; REMANDED

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B R A M M E R, Judge.

¶1 Jerrod Ross McBride petitions this court for review of the trial court's denial of the petition for post-conviction relief he brought pursuant to Rule 32, Ariz. R.

Crim. P. We will not disturb a trial court's ruling on a petition for post-conviction relief unless the court has clearly abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 A grand jury charged McBride with theft of a means of transportation and third-degree burglary of a motor vehicle belonging to M., and theft of a means of transportation and third-degree burglary of a second motor vehicle belonging to T. McBride pled guilty to one count of third-degree burglary, admitting that, in November 2007, he had burglarized a motor vehicle belonging to M. *See* A.R.S. § 13-1506. McBride also admitted he had one historical prior felony conviction. The trial court sentenced him to an aggravated, enhanced, six-year prison term, finding as aggravating factors McBride's "felony offenses in the past ten years, the financial harm to the victims, the crimes[']involving the taking of property of another and the crimes[']involving pecuniary gain."

¶3 McBride filed an of-right petition for post-conviction relief asserting the trial court had erred in imposing an aggravated sentence. *See* Ariz. R. Crim. P. 32.1. He argued his prior felony offenses were not "significantly aggravating" because he had "pled to an enhanced charge," and the three remaining prior felony convictions were "nonviolent property offenses." He also argued the court's finding of financial harm to the victims was erroneous for the following reasons: one of the victims, T., did not request restitution because her property had been returned undamaged; the harm to M. was "absolutely minimal" because she had requested only $467.57 in restitution; and,

because the offense underlying his burglary conviction was theft, a finding of financial harm "undermines Arizona's presumptive sentencing scheme."

¶4 Additionally, McBride contended two factors the trial court had relied on, the crimes' "involving taking property of another and pecuniary gain," were "essentially one and the same" and "virtually identical" to the financial harm factor. He further asserted there was no evidence to support the court's conclusion T. had suffered financial harm. And, last, McBride argued the mitigating circumstances were "overwhelming." After an evidentiary hearing, the court denied McBride's petition, finding it had no merit and "reaffirm[ing] its prior finding that the aggravating circumstances substantially outweigh all of the mitigating circumstances, justifying an aggravated sentence in this case."[1] This petition for review followed.

¶5 Except for his contention regarding his prior convictions, McBride raises on review essentially the same arguments he raised in his petition for post-conviction relief. He first argues the trial court erred in considering financial harm to T. because, according to the presentence report, her property had been returned undamaged and she did not request restitution. Standing alone, the lack of damage to T.'s property and her failure to request restitution would not require the court to find she had suffered no financial harm if other evidence suggested she had. But we have been neither directed to,

[1]At the hearing on McBride's petition for post-conviction relief, the trial court questioned McBride regarding "a mass on one of his lungs." Noting "this circumstance was not on the record at the time of sentencing," the court nonetheless "considered this additional mitigating circumstance in evaluating [McBride's] Rule 32 Petition." The state does not argue it was improper for the court to have considered this evidence as an additional mitigating factor, and we therefore do not address this issue.

nor found, such evidence in the record. Thus, the court's conclusion that T. suffered financial harm is unsupported,[2] and we must grant McBride relief on this basis. *See State v. Ojeda*, 159 Ariz. 560, 561, 769 P.2d 1006, 1007 (1989) ("In the sentencing context, if the judge relies on inappropriate factors and it is unclear whether the judge would have imposed the same sentence absent the inappropriate factors, the case must be remanded for resentencing.").

¶6 Although we grant McBride's request for relief, we address the other issues he raises because, depending on the sentence he receives on remand, they could well arise in a subsequent Rule 32 proceeding after he is resentenced. McBride contends a finding of financial harm to M. was unwarranted because the amount of restitution she requested—$467.67—was "minimal . . . by today's standards" and because, he asserts, that amount would not support a charge of felony theft. *See* A.R.S. § 13-1802(E). We reject this argument because A.R.S. § 13-702(C)(9)[3] provides that a court may consider financial harm to the victim as an aggravating factor. Although the amount of that harm is certainly relevant to the weight properly to be given that factor, nothing in the statute

[2]The trial court did not address this issue in its decision denying post-conviction relief. Indeed, it addressed directly none of McBride's arguments, instead merely reiterating its sentencing findings. We encourage trial courts to clearly identify the bases for their decisions and to address and resolve contentions raised by the parties. *See Brown v. Superior Court*, 137 Ariz. 327, 331 n.5, 670 P.2d 725, 729 n.5 (1983) ("We encourage trial judges to assist reviewing courts by stating on the record the specific reasons for their actions.").

[3]Significant portions of the Arizona criminal sentencing code have been renumbered effective "from and after December 31, 2008." 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. We refer to the sentencing statutes as they were numbered when McBride committed the offense. *See* 2006 Ariz. Sess. Laws, ch. 148, § 1 (former § 13-702); 2007 Ariz. Sess. Laws, ch. 287, § 1 (former § 13-604).

prevents a court's consideration of financial harm unless it exceeds a certain monetary threshold. McBride cites no authority suggesting otherwise, and we find none.

¶7 McBride next argues, relying on *State v. Germain*, 150 Ariz. 287, 723 P.2d 105 (App. 1986), that aggravating his sentence based on findings of financial harm, the taking of property, and pecuniary gain "undermines Arizona's presumptive sentencing scheme." In *Germain*, Division One of this court determined that, because recklessness was not an aggravating factor specifically enumerated in § 13-702, a trial court properly could aggravate a defendant's sentence for reckless manslaughter based on that factor only if "the defendant's misconduct rises to a level beyond that which is merely necessary to establish an element of the underlying crime." 150 Ariz. at 290, 723 P.2d at 108.

¶8 McBride acknowledges that pecuniary gain, financial harm, and the taking of property are not elements of burglary, but he asserts that, because the underlying offense supporting his burglary conviction was theft, his conviction "implicitly contemplated [the] taking of property, pecuniary gain, and financial harm." He reasons that these factors "are common to burglaries" and, therefore, it is "likely the Legislature contemplated as much in deciding the felony level designation." Thus, he concludes, because these factors were not "noteworthy or greater than contemplated by the offense itself," the trial court erred by treating them as aggravating factors.

¶9 The burglary statute, however, does not require that any particular felony be committed. *See* § 13-1506. Indeed, an underlying felony need not actually be committed for a defendant to be found guilty of burglary—the defendant need only have intended to

commit a felony. *Id.* It would be sheer speculation for us to conclude the legislature assumed most burglaries are committed for pecuniary gain or involve the taking of property or financial harm to the victim, much less that it implicitly factored that assumption into its felony burglary classification. The legislature has provided explicitly that the sentences for crimes may be aggravated if they involve these factors. *See* § 13-702(C)(3), (6), (9). It articulated no exceptions for burglary.

¶10 Moreover, even if we agreed with McBride that the legislature assumed pecuniary gain, the taking of property, and financial harm to the victim inherently were part of burglary, *Germain* still would not apply. *Germain*'s reasoning depended on the fact that recklessness was not a specifically enumerated aggravating factor in § 13-702, instead falling under the catch-all provision. 150 Ariz. at 290, 723 P.2d at 108. Arizona courts have held repeatedly that an element of a crime may be used as an aggravating factor if specifically provided for by § 13-702—like the factors McBride complains of here. *See State v. Lara*, 171 Ariz. 282, 283-85, 830 P.2d 803, 804-06 (1992); *State v. Bly*, 127 Ariz. 370, 372-73, 621 P.2d 279, 281-82 (1980); § 13-702(C)(3), (6), (9); *see also Germain*, 150 Ariz. at 290, 723 P.2d at 108. We therefore reject his argument.

¶11 McBride also argues the aggravating factors of financial harm, the taking of property, and pecuniary gain are, on these facts, "essentially one and the same and not separately aggravating." Thus, he reasons, the trial court abused its discretion by giving these factors "independent weight." We do not agree these factors are the same. The record demonstrates that M.'s vehicle was damaged, causing her financial harm; that she was harmed is irrelevant to the court's findings that the crime was committed for

pecuniary gain and involved the taking of property. McBride deprived the victims of their property by taking their vehicles, which he abandoned; his also taking personal property from those vehicles separately demonstrated that his offenses were committed with a goal of pecuniary gain.

¶12 In any event, a trial court may find multiple aggravating factors based on the same underlying facts as long as it does not weigh the same facts twice. *See State v. Velazquez*, 216 Ariz. 300, ¶ 22, 166 P.3d 91, 98 (2007) ("A jury, like a sentencing judge, may use one fact to find multiple aggravators, so long as the fact is not weighed twice when the jury assesses aggravation and mitigation."); *State v. Medina*, 193 Ariz. 504, ¶ 25, 975 P.2d 94, 102 (1999) ("Although a trial judge may use one fact to establish two aggravators, he or she cannot weigh the victim's age twice in balancing aggravating and mitigating circumstances."); *State v. Styers*, 177 Ariz. 104, 116, 865 P.2d 765, 777 (1993) (same); *State v. Schad*, 163 Ariz. 411, 419, 788 P.2d 1162, 1170 (1989) ("So long as the trial court weighed the aggravating circumstances arising out of the [defendant's previous murder conviction] only once, the defendant's rights have not been infringed."); *State v. Tittle*, 147 Ariz. 339, 345, 710 P.2d 449, 455 (1985) ("In its balancing of factors, the trial court may only weigh aggravating circumstances arising out of the [defendant's previous] robbery [conviction] once so as to avoid any possibility of double punishment."). A trial court need not recite expressly that it weighed a particular fact only once; we presume it acted properly. *See Medina*, 193 Ariz. 504, ¶ 25, 975 P.2d at 102; *Styers*, 177 Ariz. at 116, 865 P.2d at 777. Accordingly, we reject this argument.

¶13 Finally, we reject McBride's assertion that the trial court erred in imposing an aggravated sentence because the mitigating factors "substantially outweighed" the aggravating factors. A trial court has broad discretion in determining the weight to assign aggravating and mitigating circumstances for sentencing purposes. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998). It "does not act arbitrarily if it investigates all the facts relevant to sentencing and finds aggravating and mitigating factors within the statutory guidelines," as the court did here. *Id.* Furthermore, the sentence imposed here was within the statutory range. *See State v. Little*, 121 Ariz. 377, 381, 590 P.2d 916, 920 (1979) (sentence within statutory limits not excessive); §§ 13-1506(B); 13-604(A). Although the court may impose a lesser sentence on remand, nothing in the record before us requires it to do so.

¶14 For the reasons stated, we grant McBride's petition for review, vacate his sentence for burglary, and remand the case to the trial court for resentencing.

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J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge